ILE COPY

Supreme Court, U.S.
FILED
JUL 13 19
JAMES F. DAVEY, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 969 112.

RAYMOND E. FISHER,

Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES A. VELDE,
JOSEPH P. CARR,
33 South Clark Street,
Chicago 3, Illinois,
Attorneys for Respondent.

GARDNER, CARTON, DOUGLAS, ROEMER & CHILGREN,
Of Counsel.

Photograph taken in center of Route 224 about 415 feet
west of the railroad intersection looking east

TABLE OF CONTENTS.

	PAGE
Questions Presented	1
Reasons for Denying Writ	2
Statement of the Case	2
Argument	7
I. The Court of Appeals Correctly Applied Ohio Law in Holding Petitioner Guilty of Contributory Negligence	7
Ohio Case Law	7
Ohio Statute	16
Regulation of Interstate Commerce Commission	17
II. The Decision Below Does Not Conflict With Decisions of the Sixth Circuit	17
III. The Seventh Amendment Was Not Violated by the Court of Appeals	20
IV. Petitioner Has Not Shown Special and Important Reasons for Granting Review on a Writ of Certiorari	27
Conclusion	29
Appendix	31

List of Authorities Cited.

Cases.

Ballmer v. Pennsylvania R. Co., 17 N. E. 2d 435 (Ohio, 1938) 15

Baltimore & C. Line v. Redman, 295 U. S. 654 (1934) .. 21

Baxter, Admr. v. Continental Casualty Co., 284 U. S. 578 (1931) 27

Biery v. Pennsylvania R. Co., 99 N. E. 2d 895 (Ohio, 1951) 15

Bowman v. Baltimore & O. R. Co., 90 N. E. 2d 390 (Ohio, 1949) 9, 14, 23

Cleveland C. C. & I. Ry. Co. v. Schneider, 17 N. E. 321 (Ohio, 1888) 12-13, 18

C. M. & D. M. F. Co. v. L. & N. R. R. Co., 10 N. E. 2d 448 (Ohio, 1937) 10, 13, 15, 18, 23

Continental baking Co v. Pennsylvania R. Co., 96 N. E. 2d 258 (Ohio, 1950) 9

Eastern Motor Dispatch, Inc. v. Pennsylvania R. Co., 77 N. E. 2d 275 (Ohio, 1947) 13

Erie R. R. v. Tompkins, 304 U. S. 64 (1938) 28

Galloway v. U. S., 319 U. S. 372 (1943) 21

Giglioth v. N. Y., C. and St. L. R. R. Co., 157 N. E. 2d 447 (Ohio, 1958) 9

Hood v. N. Y., C. & St. L. R. R. Co., 144 N. E. 2d 104 (Ohio, 1957) 24

Hubbard v. Pennsylvania R. Co., 232 F. 2d 631 (C. A. 6, 1956) 14, 20

Illinois Central R. R. Co. v. Underwood, 235 F. 2d 868 (C. A. 5, 1956) 28

Jollay v. Pennsylvania R. Co., 38 N. E. 2d 204 (Ohio, 1941) 11

Lynch v. Pennsylvania R. Co., 194 N. E. 31 (Ohio, 1934) 10, 14

Moudy v. N. Y., C. & St. L. R. R. Co., 53 N. E. 2d 406 (Ill., 1944) 16

N. L. R. B. v. Pittsburgh S. S. Co., 340 U. S. 498 (1951) 28

New York Central R. R. Co. v. Delich, 252 F. 2d 522 (C. A. 6, 1958) 13, 18, 20

Northwest Airlines v. Glenn L. Martin, 224 F. 2d 120 (C. A. 6, 1955) 17, 20

O'Donnell v. Geneva Metal Wheel Co., 190 F. 2d 59 (C. A. 6, 1950) 23

Patton v. Pennsylvania R. Co., 24 N. E. 2d 597 (Ohio, 1939) 16

Pennsylvania R. Co. v. Goldie, 182 F. 2d 9 (C. A. 6, 1950) 22

Pennsylvania R. Co. v. Rusynik, 159 N. E. 826 (Ohio, 1927) 9-10, 16, 18, 23

Reed v. Detroit, Toledo & Ironton R. Co., 132 N. E. 2d 776 (Ohio, 1955) 14

Rogers v. Missouri Pacific R. Co., 352 U. S. 500 (1957) 22

Ruhlin v. N. Y. Life Insurance Co., 304 U. S. 202 (1938) 27

Shook v. Wheeling & L. E. R. Co., 31 N. E. 2d 255 (Ohio, 1936) 10

Smith v. Reinauer Oil Transport, 256 F. 2d 646 (C. A. 1, 1958) 22

Texas & Pacific Ry. Co. v. LaBorde, 257 F. 2d 587 (C. A. 5, 1958) 28

Thomas v. Pennsylvania R. Co., 45 N. E. 2d 776 (Ohio, 1942) 12

Toledo Terminal R. R. Co. v. Hughes, 154 N. E. 916 (Ohio, 1926) 14

Wheat v. Baltimore & Ohio Ry. Co., 262 F. 2d 289 (C. A. 7, 1959) 28

Woodworth v. New York Central Ry. Co., 80 N. E. 2d 172 (Ohio, 1948) 8, 24

Zivkoff v. Pennsylvania R. Co., 90 N. E. 2d 148 (Ohio, 1948) 15

Statutes.

Employers' Liability Act, 45 U. S. C. 53 22

Interstate Commerce Act, 49 U. S. C. Sec. 304 17

Page's Ohio Revised Stat. Ann., Sec. 4513.20(G) 16

Page's Ohio Revised Stat. Ann., Sec. 4955.33 24

Regulations.

49 Code of Federal Regulations Sec. 192.3 17

49 Code of Federal Regulations Sec. 192.11 17

Article.

"The Railroad Crossing Law of Ohio," by Earl E. Mayer, Jr., Ohio State Law Journal, Vol. 15, pp. 361 et seq. (1954) 7-8, 11, 13-14, 18-19, 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 969.

RAYMOND E. FISHER,

Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

Petitioner's statement of questions (pp. 2-4) is incomplete and argumentative. To say that petitioner had no warning to permit him to avoid a collision ignores three signs indicating the approach of the railroad as well as the south bound train that petitioner saw when ¾ of a mile away according to his own testimony.

The question presented is whether there are "special and important reasons" for review by this Court when a Court of Appeals has held that under applicable state law it was contributory negligence as a matter of law for petitioner, knowing of the existence of a railroad when he was ¾ of a mile away, to operate his truck in open country at such a high rate of speed that he was unable to stop

before it collided with a train on the railroad. This is the main question as the case was tried and disposed of in the courts below. The opinion of the Court of Appeals did not reach the question of petitioner's contributory negligence as a matter of law under the "brake" statute of the State of Ohio and the regulations of the Interstate Commerce Commission as explained in this brief (pp. 16-17).

Petitioner's claims of violation of the Seventh Amendment and conflict with Sixth Circuit decisions are of no substance.

REASONS FOR DENYING WRIT.

The Court of Appeals correctly followed the clearly applicable principles of Ohio law that control the result in this case. But even if the decision of the Court of Appeals were erroneous under Ohio law, there is no special or important reason for review by certiorari. This is an ordinary diversity of citizenship case involving an accident at a railroad crossing.

STATEMENT OF THE CASE.

Petitioner's statement of the case (pp. 6-11) needs to be corrected. His statement confuses the facts which are clearly stated in the opinion of the Court of Appeals (i-iii). His statement does not indicate that the evidence of negligence on the part of the railroad was very slight (petitioner's testimony that he did not hear a whistle until the train was 600 feet from the crossing, although he saw he was approaching a railroad in use when he was ¾ of a mile from the crossing). Nor does petitioner's statement disclose the important contradictions in his testimony between his deposition and the first and second trials.

Petitioner's own testimony shows the following:

He was driving a truck east on a main highway in Ohio in the middle of a clear February day. He was taking a heavy load—18 tons of butter—from Chicago to New York. The tractor and trailer with the load weighed 58,000 pounds. The petition describes petitioner as an "experienced driver, aged 27" (p. 8). His testimony was that he had been a chauffeur for only "about one year" (App. 18), although he had made "about 60,000 miles of trips over that road between here (Chicago) and New York" (App. 41).

When ¾ of a mile from a railroad, he saw a *southbound* train crossing the highway ahead of him. From his speed of 40-45 miles per hour, he slowed down (App. 20). At 600 feet from the railroad, going 30 miles an hour, he saw that the train would clear the highway (App. 20). It did clear when he was 200 feet from the railroad, going 30-35 miles (App. 20, 36).* When he was "probably 150 feet"** from the railroad, he saw a *northbound* train 600 feet from the crossing and heard it whistle (App. 20-21). He applied all his brakes. But he was still going two to three miles per hour when the front left corner of the truck collided with the train (App. 20), causing the injuries for which he sued respondent.

There is no doubt he had a clear warning of the approach of the railroad. The photograph reproduced in this brief, taken three days after the accident at about 415 feet west of the railroad, shows the three warning signs (see App. 28, 172).

The controlling fact, nowhere recognized in the petition, is that petitioner was driving this extremely heavy equip-

* On direct examination petitioner testified he was 200 feet from the crossing when the train cleared (App. 20). On cross he said 600 feet (App. 35).

** At the first trial he said "possibly 200 feet" (App. 33).

ment at such a high rate of speed that, when he saw the train while at least 150 feet from the railroad, he was unable to stop before striking the train. The result under Ohio law is clear: his conduct was contributory negligence as a matter of law. This result is as much the law of Ohio as that the defendant was guilty of negligence under the verdict of the jury.

In an effort to excuse his negligence, petitioner raises a false issue. He says he thought there was only a single track of railroad so that, when he saw the southbound train clear the highway, he thought there could be no other train coming. He relies on oral testimony and photographs in evidence in an attempt to show that a dip in the highway obscured the view of the second track (Pet. 9). There are obvious refutations:

(1) If there was a dip or other obstruction that impeded petitioner's view of the dangers of the railroad crossing, it was petitioner's duty to slow down or stop before proceeding. Ohio decisions discussed in the argument make this clear.

(2) When a driver approaches a railroad in fairly level country, he does not see whether there is a single, double, or multiple track until he is very close to the railroad. Here there was even a slight rise up to the right of way (App. 170). Even without the claimed dip, petitioner would not have seen the second track.

(3) Petitioner was wholly and negligently unreasonable if he assumed there was only a single track. Double track railroads are common in this country. Since trains go back and forth, double tracks are commonly provided for traffic in both directions. In approaching a railroad in open country, fully marked as this one was, the driver who assumes a single track is as negligent as if he should assume the train would go only five miles per hour.

(4) Petitioner's claims about the extent of the dip are greatly exaggerated. The photograph inside the front cover of this brief, taken 415 feet west of the railroad, and stipulated to be accurate (App. 30), doesn't show a dip. The scale profile (Def. Ex. 2, App. 170) shows a low point 200 feet west of the railroad, and a rise of four feet to the railroad. Petitioner's witnesses variously estimated the low point to be eight to four feet below the railroad level. But petitioner contends that the obstruction was not from the low point to the railroad, but from 500 feet west to the low point at 200 feet west. The scale profile and all the testimony show the downgrade between these two points to be only *two feet* or 0.6, which is invisible to the naked eye (see App. 63, 74-76, 81). The physical facts thus refute petitioner's dip theory.

(5) It was a late afterthought for petitioner to construct the theory of the dip to excuse his own negligence. The dip was not mentioned in petitioner's sworn deposition or at the first trial. On both of these occasions he said he did not see the *northbound* train because it was on the *wrong* track, *i.e.*, northbound on the *west* track (App. 35, 61). Before the first trial petitioner sa' ! he had thought it safe to cross the tracks because the "blinker lights" went out (App. 69, 94). There never were any such lights at the crossing. The dip theory is just as weak as the earlier theories of the wrong track and blinker lights that petitioner has abandoned.

Other material contradictions that weaken petitioner's entire case are

—his statements that he first saw the northbound train when it was 150 feet and 600 feet from the crossing (App. 21, 98);

—his statements that his truck struck the front of the train and the second engine of the train (App. 40, 41);

—his statements that he was 150 feet from the railroad when he first saw the northbound train and could have been 175 to 200 feet away (App. 33) [skidmarks and other facts stated by *petitioner's* witness indicated the distance to be at least 175 to 250 feet, App. 58, 59, 25].

Petitioner's statement (p. 8) that the charge to the jury was a "very fair one" and placed on plaintiff the burden of proving his own due care overlooks the failure of the charge to contain a clear statement of the governing law of Ohio concerning the duty of a driver approaching a railroad crossing. The charge was objected to on that ground by respondent (App. 136) whose counsel stated that the charge should have explained petitioner's duty to approach the railroad crossing at such speed and with his vehicle under such control that he, when seeing the oncoming train, could have come to a stop to avoid a collision.

ARGUMENT.

I.

THE COURT OF APPEALS CORRECTLY APPLIED OHIO LAW IN HOLDING PETITIONER GUILTY OF CONTRIBUTORY NEGLIGENCE.

Ohio Case Law.

The Ohio cases make it clear that the law in Ohio on railroad crossings is strict. The traveler on a highway is under a heavy obligation to keep his vehicle under control as he approaches a railroad so that he can stop to avoid a collision. The rule may be different in other jurisdictions, but in this case the Court of Appeals had no option but to apply Ohio law. In so doing, it correctly found that plaintiff was guilty of contributory negligence as a matter of law. There is no doubt that an Ohio court would have reached the same result.

Here petitioner knew he was approaching a railroad. He knew that the railroad was used by trains. He saw the southbound train crossing the highway when he was three-quarters of a mile from the railroad. The train was still crossing the highway when he was 600 feet away.

If petitioner's view of the second, the northbound, train was obscured until he reached a point 150 feet to 175 feet from the railroad, he was then guilty of contributory negligence in not being able to stop before striking the train. Ohio law is clear on the duty of a driver attempting to cross a railroad after a train has passed. The author of the excellent summary of Ohio law in 15 Ohio State Law Journal 361 (1954) points out its relative stringency, and then discusses holdings that are applicable to this case (pp. 373, 375):

"If a railroad has not placed any extra-statutory signals (electric warning devices, gates, or watchmen) at a crossing, then the rule is quite clear that the traveler must exercise his sense of sight and hearing in such a manner as to be effective. Stated in different terms, the traveler must look and listen from the last place where he could avoid injury. . . . *Yet, if a clear view of the track can only be made possible by stopping, then such action is mandatory as a matter of law.* However, the mere fact that the traveler did stop, look and listen will not discharge his duty if the exercise of looking and listening was not made from a point where it would have been effective. For instance, the Ohio courts have held that where the crossing is obstructed, a traveler can be negligent as a matter of law where he looks in both directions from a distance of 60 feet, 10 feet, and 5 to 10 feet, whether the traveler stops or not." (Emphasis added.)

. . . . . .

"Another justification for failing to discern an approaching train is premised on the basis that the view of the right-of-way was obstructed. Temporary obstructions such as smoke, steam, *or passing trains* do not justify driving a vehicle onto the railroad track. The traveler must wait until such temporary obstructions cease. *Failure to wait under such conditions constitutes negligence as a matter of law.* (*Penna. Rd.* v. *Rusynik*, 117 Ohio St., 159 N. E. 826 (1927); *Eschenbach* v. *Hines*, 23 Ohio N. P. (N. S.) 255 (1921).)" (Emphasis added.)

The burden of avoiding collisions at railroad grade crossings rests primarily upon the traveler. *Woodworth* v. *New York Cent. R. Co.*, 80 N. E. 2d 142, 147 (Ohio, 1948). And where the dangers at a railroad crossing are increased by conditions obstructing the vision, a greater duty of care is imposed upon one about to pass over the crossing.

Woodworth v. *New York Cent. R. Co.*, 80 N. E. 2d 142, 147 (Ohio, 1948).

Bowman v. *Baltimore & Ohio R. R. Co.*, 90 N. E. 2d 390, 392 (Ohio, 1949).

Continental Baking Co. v. *Pennsylvania R. Co.*, 96 N. E. 2d 258, 262 (Ohio, 1950).

The general rules governing a traveler's duty in approaching a crossing behind a passing train are set forth in the leading case of *Pennsylvania R. Co.* v. *Rusynik*, 159 N. E. 826, 828 (Ohio, 1927). The court stated that, when a passing train is upon the track nearest the traveler, he must be alert to the fact that a train may be approaching from the opposite direction and completely hidden by the train on the first track. The court said (p. 828):

> "... *it is not the exercise of ordinary care for his own safety on the part of the traveler to await only until the passing train shall have cleared the crossing and then to go forward without waiting to ascertain whether another train is approaching the crossing on a track beyond that of the passing train.* Time must be given to permit the passing train to get so far beyond the crossing that the traveler, *while halted in a place of safety*, may be afforded a clear view of the track or tracks in both directions, that he may thereby know whether a moving train is in close proximity to the crossing thereby endangering any attempt he may make to cross the tracks in front of such approaching train. The omission of such caution on the part of the traveler will constitute contributory negligence on his part sufficient to bar any recovery for damages against the railway company for injuries which he may sustain in a collision with a train, due to his omission to exercise the caution stated; and this is true, notwithstanding the fact that the employees of the railway company have neglected to give the signals of the train's approach to the crossing, required by law to be given." (Emphasis added.)

This *Rusynik* case has been cited and followed in many later cases, as *Giglioth* v. *New York, Chicago & St. L. R. Co.*, 157 N. E. 2d 447 (Ohio, 1958).

Viewing the evidence in the light most favorable to the petitioner, it is apparent that he saw the northbound train when he was about 150 to 175 feet from the crossing, yet he was going at such a high rate of speed that he was unable to stop his extremely heavy truck before striking the train. Ohio cases holding that a motorist must approach a crossing with his vehicle under full control so that he can stop in time include the following:

C. M. & D. M. F. Co. v. *L. & N. R. R. Co.*, 10 N. E. 2d 448 (Ohio, 1937).

Shook v. *Wheeling & L. E. R. Co.*, 31 N. E. 2d 255 (Ohio, 1936).

Lynch v. *Penn. R. Co.*, 194 N. E. 31, 32 (Ohio, 1934).

The *L. & N.* case, in which conduct such as petitioner's here was held contributory negligence as a matter of law, is squarely in point. A truck driver was going east on a Cincinnati street in a truck and trailer with a total loaded weight of 52,300 pounds. The view of the tracks was obstructed until he was 45 feet from the railroad, when he saw the oncoming train. He was then going 15 m.p.h. He swung his truck back and forth across the street just as petitioner in the present case, but he was unable to stop. He testified it would take him 45 feet to stop when he was 45 feet from the railroad. Similarly in the present case petitioner testified it would take him 175-190 feet to stop when he was 150-175 feet from the railroad on which the oncoming train became visible. The driver in the *L. & N.* case knew a flagman was customarily at the crossing, but none was present as he approached. In holding the driver guilty of contributory negligence as a matter of law, the court said of this fact (pp. 449-450):

> *"The effect of this evidence is that the driver of the appellant's equipment passed a point of visibility at a*

rate of speed which prevented him from stopping in time to avoid a collision if a train was about to cross Front Street at that point.

"The distance from this point, the Jones & Laughlin building, was 45 feet. It required 45 feet to bring the equipment to a stop at the speed at which the equipment was permitted to pass such point.

"*It is obvious in the instant case and certainly reasonable minds could not differ that had the driver proceeded past the point where visibility was possible, at a speed permitting him to stop after the existence of the caboose and engine on the track was apparent, no injury would have resulted. . . .*

"To hold that in the instant case, the case should have been submitted to a jury is in effect holding that a jury would have been justified in finding no evidence of contributory negligence, although the driver had deliberately passed a point where he could have seen the approaching caboose and engine and stopped his equipment if he had been proceeding at a speed permitting him to do so." (Emphasis added.)

In the present case the accident occurred solely because petitioner drove his truck forward, neither looking nor listening when looking and listening would have been effective, at such a rate of speed that, when he saw the train, he was unable to stop even though he was then at least 150 feet from the railroad. Knowing his view was temporarily obscured by the passing southbound train, he had entered the area in which his brakes would not stop him in time. He either paid no attention, gambling that no other train was coming, or negligently assumed that there was only one track at the crossing. The cases are legion in which a driver was held negligent as a matter of law for driving on railroad tracks when his view of oncoming trains finally cleared at distances as little as 10 feet to 20 feet from the crossing (See 15 Ohio State L. J. 361, 373 *et seq.*)

In *Jollay* v. *Pennsylvania R. Co.*, 38 N. E. 2d 204, 206 (Ohio, 1941), the court said:

> "If an oncoming train may be observed for a distance of a thousand feet by an approaching automobile when it is 100 feet from the crossing, we would be required to say as a matter of law that this afforded ample opportunity to a driver who was observing ordinary care in approaching a known railroad crossing to bring his automobile safely to a stop before reaching the crossing."

Petitioner's repeated contentions that he thought there was only a single track and that a dip in the road prevented him from seeing the second track have been refuted above in the Statement of the Case. In addition, with Ohio law requiring him to prove his due care, it was necessary for him to establish that he was justified in believing that there would be only one track on a railroad. He argues (p. 12) that there is "no presumption of law that tracks are double-tracks and it was for the jury to say whether under all the circumstances the plaintiff was justified in acting on his belief that the crossing here was a single track". This claim overlooks the rule that he had the burden of proving his reasonable care, not in accordance with his subjective belief, but with an objective standard of reasonableness. This burden was not met.

Petitioner (pp. 22-23) relies primarily on four decisions, all of which are irrelevant to this case. *Cleveland C. C. & I. Railway Company* v. *Schneider*, 17 N. E. 321 (1888), is a leading case on the one exception to the general Ohio rule of law requiring drivers to approach a railroad with extreme care. That is where the railroad invites the traveler to cross the tracks either through raised crossing gates, a signaling flagman, or inoperative flasher lights. In the *Schneider* case the crossing gates were up. The court held that the raised crossing gates constituted an invitation to the driver. In *Thomas* v. *Pennsylvania R. R. Co.*, 45 N. E. 2d 776 (1942), a flagman, posted to warn travelers of approaching trains, invited a driver to enter upon the tracks.

In *Eastern Motor Dispatch, Inc.* v. *Pennsylvania R.R.*, 77 N. E. 2d 275 (Ohio, 1947), a watchman gave the driver a signal to cross the tracks. There too, the accident occurred in the nighttime with the view obstructed by the defendant and a fast train operated along the tracks. In *New York Cent. R. R. Co.* v. *Delich*, 252 F. 2d 522 (C. A. 6, 1958), the accident occurred in the nighttime at a multiple crossing with a train traveling at seventy miles per hour. The blinker lights protecting the crossing were not operating. Under those circumstances, a divided court applying the exception of the *Schneider* case found there had been an invitation to the plaintiff to cross the tracks and that he was not guilty of contributory negligence at a matter of law.

It is obvious from the facts in these four cases that they are not applicable to the situation here where petitioner approached a known railroad crossing in broad daylight with no special invitation from the railroad company that would remove the burden imposed on him by Ohio law. To this situation is applicable the stringent Ohio law governing the conduct of a driver approaching a crossing at which there are no extraordinary safety devices, 5 Ohio State L.J. 361, 373.

Petitioner attempts to distinguish the controlling Ohio cases by claiming that in them the plaintiffs knew the extent of the danger because they were familiar with the crossings, whereas here petitioner was not familiar with the crossing. In none of the Ohio cases, however, is the fact of familiarity with the crossing of controlling importance. In the *L. & N.* case cited above, 10 N. E. 2d 448 (1937), familiarity with the crossing was claimed to create an excuse, not to impose an obligation on the driver. Because of his familiarity with the crossing, he knew it was customarily protected by a flagman. When he saw no flagman at the crossing, the truck driver reasonably, one might say,

assumed no train was coming. But the Ohio court held that the driver passed a point of visibility at a rate of speed which prevented him from stopping in time to avoid a collision if a train were about to cross the road. Familiarity with the crossing in that case led the plaintiff into a position of danger rather than the reverse.

In *Reed* v. *Detroit T. & I. R. Co.*, 132 N. E. 2d 776 (Ohio, 1955), the fact of familiarity although briefly mentioned was not even alluded to when the court talked about the law requiring a finding that plaintiff was guilty of contributory negligence. Petitioner admits that in *Bowman* v. *Baltimore & Ohio R. R. Co.*, 90 N. E. 2d 390 (Ohio, 1949), familiarity with the crossing was not an element. Other Ohio cases ignore the question of familiarity. In *Hubbard* v. *Pennsylvania R.R. Co.*, 232 F. 2d 631 (C.A. 6, 1956), a case very similar on its facts to the instant one, the decedent operated his truck so as to crash into the side of the tender of an engine while traveling at a high rate of speed under conditions of good visibility. There were signs warning of the existence and proximity of the crossing. Since the court pointed out that the signs told of the presence of the railroad crossing, the court did not base its holding on the driver's familiarity with the crossing.

Moreover, petitioner mistakes the significance attached to familiarity with the crossing. Familiarity charges a traveler with knowledge that the crossing is there, and that it is used by trains. See *Toledo Terminal R.R. Co.* v. *Hughes*, 154 N. E. 916, 919 (Ohio, 1926); 15 Ohio State L.J. 361, 373. Much the same argument as petitioner now makes was made in *Lynch* v. *Pennsylvania R.R. Co.*, 194 N.E. 31, 32 (Ohio, 1934), where the court held that despite the claimed lack of familiarity with the crossing, plaintiff was guilty of contributory negligence since the driver could see that the crossing was there. In *Hubbard* v. *Pennsylvania R.R. Co.*,

232 F. 2d 631 (C.A. 6, 1956), without discussing familiarity, the court found the truck driver guilty of negligence since he knew, or should have known, "of the existence and proximity of the crossing."

Even the case stressed by petitioner (pp. 26-27), *Zivkoff* v. *Pennsylvania R. R. Co.*, 90 N. E. 2d 148, 153 (Ohio, 1948), pointed out that familiarity with a crossing relates to knowledge of the presence of the crossing. There the accident happened at night at a crossing with four tracks with the view obscured up to the time the traveler reached the tracks. *Trees obscured the warning sign which would have alerted a traveler to the presence of a crossing.*

In *Biery* v. *Pennsylvania R. R. Co.*, 99 N. E. 2d 895 (Ohio, 1951), there was an eleven track crossing, with obstructions on the right of way created by defendant, and the train involved in the accident was traveling at 70 m.p.h.

Petitioner fails to cite one Ohio decision with facts similar to those presented here. He places total reliance on cases illustrating well known exceptions to the Ohio general rule—cases involving an invitation to the traveler to proceed either by raised gates, a beckoning flagman, or stilled flashers. No exception applies here.

The *L. & N.* case, 10 N. E. 2d 448 (Ohio, 1937), is on all fours with this case and is controlling here. And the Ohio cases generally indicate the same result. It is clear that an Ohio Court would unhesitatingly hold that the petitioner in this case was guilty of contributory negligence as a matter of law, and that a verdict should have been directed for the defendant accordingly.

Applicable here is the comment in *Ballmer* v. *Pennsylvania R. Co.*, 17 N. E. 2d 435, 438 (Ohio, 1938):

> "In this age of numerous and often speedy motor vehicles on the highway, our courts are not inclined by their judgments to encourage highways travelers to engage in a race with death at railroad grade crossings."

Ohio Statute.

An Ohio statute provides (Page's Ohio Revised Stat. Ann., Sec. 4513.20(G):

> "Every * * * motor vehicle or combination of motor-drawn vehicles shall be capable at all times and under *all conditions of loading* of being stopped on a dry, smooth, level road free of loose material, upon application of the service or foot brake, within the following specified distances, or shall be capable of being decelerated at a sustained rate corresponding to these distances:
>
> > "(1) * * * [V]ehicles or combinations of vehicles having brakes on all wheels shall come to a stop in thirty feet or less from a speed of twenty miles per hour." (Emphasis added.)

Petitioner testified that at 30 miles per hour it would take him from 150 to 175 feet to stop his truck (App. 38, 61, 192). It is obvious that he was driving a truck that was not equipped with brakes capable of stopping it within 30 feet at 20 miles per hour. In applying a similar Illinois statute, the Supreme Court of Illinois, in *Moudy* v. *N. Y., C. & St. L. R. R. Co.*, 385 Ill. 446, 451 (1944), held that it was the duty of the plaintiff to comply with the statute and that the proximate cause of an accident was the contributory negligence of the plaintiff in operating his vehicle at such a rate of speed that it could not be stopped when the train was seen. It has been held by the courts of Ohio that a violation of a statute is negligence *per se*.

> *Pennsylvania R. Co.* v. *Rusynik*, 159 N. E. 826, 828 (Ohio, 1927).
>
> *Patton* v. *Pennsylvania R. Co.*, 24 N. E. 2d 597, 600 (Ohio, 1939).

The Ohio statute calls for the same result reached by the Court of Appeals.

Regulation of Interstate Commerce Commission.

An additional ground supporting the judgment below is the fact that petitioner was a driver of a truck engaged as a common carrier in interstate commerce. Pursuant to the Interstate Commerce Act (49 U. S. C. 304, Appendix to this brief, p. 32), the Interstate Commerce Commission has issued regulations concerning the safety of motor carrier operations. One of the regulations, in effect in 1954 and binding on petitioner, reads as follows (49 Code of Federal Regulations, § 192.11, Appendix 32):

> "Every motor vehicle . . . shall, upon approaching a railroad grade crossing, be driven at a rate of speed which will permit said motor vehicle to be stopped before reaching the nearest rail of such crossing and shall not be driven upon or over such crossing until due caution has been taken to ascertain that the course is clear."

Section 192.3 provides that even though state law may provide for a less strict standard, the commission regulations are binding upon the driver. It is apparent that petitioner did not obey the safety rule laid down for his protection. He was, by law, bound to obey that rule. His failure to do so caused this accident and was contributory negligence as a matter of law.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THE SIXTH CIRCUIT.

It is significant that, while citing two cases in support of his assertion that there is a conflict between circuits, petitioner (pp. 28-30) does not set forth the facts in the cases. They are so dissimilar that no actual comparison with the present case is possible.

Northwest Airlines v. *Glenn L. Martin*, 224 F. 2d 120

(C. A. 6, 1955), was not a railroad crossing case nor even a suit for damages for a negligent physical injury. Plaintiff airline sued defendant manufacturer for selling airplanes which contained a hidden structural defect. Defendant claimed that if it was negligent in manufacturing the planes, the plaintiff was negligent in not making an inspection to discover the defect. In disposing of this contention, the Sixth Circuit pointed out that it is not contributory negligence to fail to look out for danger *where there is no reason to apprehend any.* However, under Ohio law, a railroad crossing is a place of known danger. And as shown by many cases cited in Point I, the negligence of the railroad does not excuse a traveler from his obligation to use due care when approaching a crossing. *CM & DMF Co.* v. *L. & N. R. R. Co.*, 10 N. E. 2d 448 (Ohio 1937); *Pennsylvania R. Co.* v. *Rusynik*, 159 N. E. 826 (Ohio, 1927); 15 Ohio State L. J. 361 (1954).

N. Y. Central RR. Co. v. *Delich*, 252 F. 2d 522 (C. A. 6, 1958), is similar to this case only in that both are railroad crossing cases. There the accident happened at night, the train was traveling at 70 miles per hour, and *flasher lights were not working.* A divided court, holding that the plaintiff was not guilty of contributory negligence as a matter of law, based this result on the exception created by the early *Schneider* case (p. 524):

> "By the silence of the signal he was entitled to rely upon the indication of safety given by the failure of the flashers to operate. *Cleveland, C., C. & I. Railway Company* v. *Schneider*, 45 Ohio St. 678, 17 N. E. 321, 322."

This is an application of the rule in Ohio where the railroad has undertaken to give extra-statutory warnings such as gates, flashers, flagmen, etc. and the extra-statutory warnings are not working. It has no application to a case such as ours where there is no failure of additional

warning devices. In such cases the rule is that pointed out in 15 Ohio State L. J. 361, 373, 375:

"If the railroad has not placed any extra-statutory signals (electric warning devices, gates, or watchmen) at a crossing, then the rule is quite clear that the traveler must exercise his sense of sight and hearing in such a manner as to be effective. Stated in different terms, the traveler must look and listen from the last place when he could avoid injury. This locus would be just before going onto the track or far enough away that the traveler could cross the track in safety from that particular point; or if after starting across the tracks, the traveler could by the exercise of ordinary caution avoid the accident, this is then the place of effective looking. For example, if the driver can ascertain whether the track is clear without bringing the vehicle to a stop, then he has no duty to stop. *Yet, if a clear view of the track can only be made possible by stopping, then such action is mandatory as a matter of law.* However, the mere fact that the traveler did stop, look and listen will not discharge his duty if the exercise of looking and listening was not made from a point where it would have been effective. For instance, the Ohio courts have held that where the crossing is obstructed, a traveler can be negligent as a matter of law where he looks in both directions from a distance of 60 feet, 10 feet, and 5 to 10 feet, whether the traveler stops or not." (Emphasis added.)

"Another justification for failing to discern an approaching train is premised on the basis that the view of the right-of-way was obstructed. Temporary obstructions such as smoke, steam, *or passing trains* do not justify driving a vehicle onto the railroad track. The traveler must wait until such temporary obstructions cease. *Failure to wait under such conditions constitutes negligence as a matter of law.* (*Penna. Rd.* v. *Rusynik*, 117 Ohio St. 530, 159 N. E. 826 (1927); *Eschenbach* v. *Hines*, 23 Ohio N. P. (N. S.) 255 (1921).)" (Emphasis added.)

The distinctive facts in the *Delich* and *Northwest Airlines* cases rebut the argument that the decisions in those cases are inconsistent with the decision in the instant case. Moreover, the Sixth Circuit, in a recent decision involving facts more nearly pertinent to those in the instant case, concluded as a matter of Ohio law that a truck driver was guilty of contributory negligence as a matter of law. In *Hubbard* v. *Pennsylvania RR. Co.*, 232 F. 2d 631 (C. A. 6, 1956), the plaintiff drove his truck into the side of a tender at a time when the tender and locomotive were being backed across the road. The court held (p. 632):

> ". . . the decedent so operated his truck as to crash into the side of the tender while traveling at a high rate of speed under conditions of good visibility and *cautionary warnings of the existence and proximity of the crossing*, constituting contributory negligence as a matter of law." (Emphasis added.)

So in the instant case the petitioner had knowledge of the existence and proximity of the crossing. Yet he continued to operate his truck toward an obstructed crossing on which a train was passing and he drove at such a rate of speed that, when the oncoming train appeared, he could not stop and crashed into the side of the train.

The result reached here by the Seventh Circuit is thus in accord with a relevant decision of the Sixth Circuit, and there is no inconsistent decision of the Sixth Circuit.

III.

THE SEVENTH AMENDMENT WAS NOT VIOLATED BY THE COURT OF APPEALS.

Petitioner contends (pp. 13-22) that the Court of Appeals "re-examined" the facts and therefore violated his rights under the Seventh Amendment of the Constitution of the United States. If petitioner's argument were sound,

the Seventh Amendment would forbid the Court of Appeals to reverse any judgment based on a jury verdict and enter judgment for the loser in the trial court.

The Seventh Amendment provides that any fact tried by a jury shall not be re-examined in any court in the United States other "than according to the rules of common law". At common law there was a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved. Under this practice, both the District Court and the Court of Appeals have authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation. In *Baltimore & C. Line* v. *Redman*, 295 U. S. 654 (1934), the plaintiff recovered a verdict from a jury, judgment was entered on the verdict, and the District Court rejected the motion for judgment notwithstanding the verdict. The Court of Appeals reversed but ordered a new trial under the impression that it could not enter judgment for the defendant. This court held, however, that the Seventh Amendment did not prohibit a Federal Court in applying state law to reverse and enter judgment for the defendant when, by state law, defendant was entitled to such a judgment. *Galloway* v. *United States*, 319 U. S. 372, 393 (1943), repeated the holding that the Seventh Amendment did not foreclose the power of the court to determine the legal sufficiency of the opposing case.

Petitioner confuses two different things, (a) a violation of the guaranty of trial by jury and (b) the possible error that a court may commit in examining the evidence to determine whether, viewed in the light most favorable to petitioner, he has fulfilled his obligation to prove his case.

If there is error, it is committed in carrying out the provisions of the Seventh Amendment and not in contravening them. As Judge Magruder said in *Smith* v. *Reinauer Oil Transport*, 256 F. 2d 646, 649 (C. A. 1, 1958):

> "If an Appellate Court is of the view that the trial judge made an error of judgment in entering judgment for the defendant notwithstanding a plaintiff's verdict . . . we cannot see that anything is gained by blowing up that error of judgment into a denial of the constitutional right to a jury trial as guaranteed by the Seventh Amendment."

Similarly, no such constitutional violation occurs when the Court of Appeals, acting under the Seventh Amendment's reference to "the rules of the common law", holds that as a matter of law the trial judge erred in denying a motion for judgment notwithstanding the verdict.

Petitioner attempts (pp. 13-14) to equate an ordinary railway crossing case governed by state law to cases under the Federal Employers' Liability Act, in which a jury verdict is proper if a railroad employer's negligence played any part, even the slightest, in producing the injury. *Rogers* v. *Missouri Pacific*, 352 U. S. 500, 509, 510 (1957), explained that Congress, dissatisfied with the common law, "vested the power of decision in these actions exclusively in the jury in all but infrequent cases" and that there were "special features of this statutory negligence action which makes it significantly different from the ordinary common-law negligence action".

The Federal Employers' Liability Act expressly provides that the plaintiff's contributory negligence "shall not bar a recovery" but merely diminish the damages fixed by the jury (45 U. S. C. 53). In the present case contributory negligence is a bar under the applicable Ohio law. It is therefore apparent that cases under the Federal Employers' Liability Act are irrelevant here. *Pennsylvania*

R. R. v. *Goldie*, 182 F. 2d 9, 12 (C. A. 6, 1950), quoted by petitioner for a contrary statement (p. 14), was greatly narrowed in the later Sixth Circuit case of *O'Donnell* v. *Geneva Metal Wheel Co.*, 190 F. 2d 59 (C. A. 6, 1950).

Much of petitioner's argument on the Seventh Amendment (pp. 15-22) is merely an attack on the decision of the Court of Appeals that the evidence, viewed most strongly in petitioner's favor, established his contributory negligence as a matter of Ohio law. Petitioner's contentions are answered by the record and the Ohio law.

Petitioner claims (p. 15) that the evidence posed three questions, all of which the jury verdict is said to have answered favorably to petitioner:

> (1) Whether the dip in the road obstructed petitioner's view of the second track.

The Court of Appeals accepted as true petitioner's claim that the dip was an obstruction to the view (Pet. iii), but pointed out that under Ohio law the presence of an obstruction imposes on a traveler an obligation of greater care. *Bowman* v. *Baltimore & Ohio R. R. Co.*, 90 N. E. 2d 390 (Ohio 1949); *Pennsylvania R. R. Co.* v. *Rusynik*, 159 N. E. 826 (Ohio 1927).

> (2) Whether the "undoubted failure" of the respondent to give warning that the crossing comprised two tracks relieved petitioner of the burden of stopping, looking and listening.

As the Ohio cases cited by the Court of Appeals point out, the failure of a railroad to give warning does not relieve a driver of his duty to stop, look or listen. *Pennsylvania R. R. Co.* v. *Rusynik*, 159 N. E. 826, 828 (Ohio 1927); *C. M. & D. M. F. Co.* v. *L. & N. R. R. Co.*, 10 N. E. 2d 448 (Ohio App. 1937); 15 Ohio State L. J. 361 (1954). Moreover, petitioner's claim that the railroad failed to warn him of a two-track crossing is fallacious in fact as well as

theory. Petitioner contends that the cross-buck sign should have included a statement of "two-tracks". But by the time petitioner had reached the point at which he could have read the cross-buck sign, he had already seen the train and was traveling at such a speed that he could not stop his extremely heavy equipment before hitting the train. It is noteworthy that the type of sign with markings present at this crossing is prescribed by statute and found at most double track crossings in Ohio. Page's Ohio Revised Stat. Ann. Sec. 4955.33, quoted App. to this brief, p. 31; see *Hood* v. *N. Y. C. & St. L. R. R. Co.*, 144 N. E. 2d 104, 108 (Ohio, 1957); *Woodworth* v. *N. Y. C. R. R. Co.*, 80 N. E. 2d 142, 146 (Ohio, 1948).

(3) Whether the combination of the purported dip in the highway, the appearance of the crossing, the failure to post a two-track sign, and the alleged failure to whistle would support a finding that plaintiff was not guilty of contributory negligence.

All these factors were argued by petitioner in the Court of Appeals, were considered by the Court, and were rejected as a matter of Ohio law. The failure to signal and warn, under Ohio law, does not relieve a driver of his burden of approaching a crossing with his vehicle under control.

Petitioner argues (pp. 16-17) as if the Court of Appeals rejected petitioner's theory that the claimed dip obstructed his view. In fact the opinion accepted his testimony at face value (see Pet. iii). Petitioner ignores the fact, shown above in Point I, that the dip in the highway under Ohio law placed petitioner under an obligation to use increased care. Whether or not the dip obstructed the view, he was guilty of contributory negligence as a matter of law.

But in fact the dip in the highway did not impede petitioner's view of the *second tracks*. He never so testified.

Plaintiff's Exhibit 1, a photograph taken near the bottom of the so-called dip, makes it apparent that there was more than one set of tracks (App. 139). Defendant's Exhibit 4, set forth at the beginning of this brief, shows a crossing at which the tracks could be either single or double. To argue that the dip concealed the second set of tracks ignores the fact that, from a distance, the first set of tracks will always conceal the second set of tracks at any crossing. This is true because the tracks lie in a horizontal plane and only the near tracks are presented to the eye.

There was no failure of defendant to warn petitioner that the crossing had two tracks since he, as an experienced traveler, must have known that most railroads in the country are double-tracked.

The Court of Appeals did not contradict the jury verdict in stating that the petitioner approached the railroad crossing in level country. The exhibits (Plaintiff's Exhibit 1, Defendant's Exhibit 4, and Defendant's Exhibit 2, App. 170, all stipulated to be accurate) demonstrate that there was no substantial variation in the level of the countryside.

Petitioner (p. 18) criticizes the statement by the Court of Appeals that the petitioner "started accelerating to go across on the assumption that no other train was coming". Petitioner even says, "There is no testimony that plaintiff accelerated" (p. 18). Petitioner himself testified that he was "down in the 30-mile range" when 600 feet from the crossing, and "somewhere around 30 to 35 miles an hour, between there" when 200 feet from the crossing (App. 36). Petitioner's own testimony thus shows acceleration, particularly since the 200 feet point was the lowest part of the dip. And petitioner admitted that when the southbound train crossed the highway, he "dropped into fourth gear and proceeded to cross the crossing" (App. 94). This admission was never qualified and can have no

other meaning but that petitioner accelerated. Moreover, under Ohio law, it makes no difference whether he accelerated or continued at the same speed. He approached a known railroad crossing at such a rate of speed that he was unable to stop even though he had warning more than 175 feet from the crossing that a train was coming. This is contributory negligence as a matter of law in Ohio.

The curious reasoning on pages 19-20 of the Petition demonstrates the lack of merit in petitioner's contention that he was justified in believing there was only a single track. According to his own story, at the time he entered into the dip which obstructed his view, the crossing could have been either a single or a double track. He proceeded on at the same rate of speed even though he had no basis on which to conclude the track was one or two. Only when he reached a point at which he was unable to stop his heavy truck at his speed and when he saw the oncoming northbound train was he able to read a sign which, according to him, failed to warn him that there were two tracks.

Under the law of Ohio, shown by clear precedents cited in Point I above, if a traveler on the highway has knowledge of the existence of a railroad crossing which is occupied by a passing train, he must approach the crossing with the expectation that another train bound in the opposite direction may be concealed behind the train that he sees. Here it is clear beyond doubt and by petitioner's own admission that he disregarded the possibility of the second train. The Court of Appeals was clearly right in holding him guilty of negligence as a matter of law.

IV.

PETITIONER HAS NOT SHOWN SPECIAL AND IMPORTANT REASONS FOR GRANTING REVIEW ON A WRIT OF CERTIORARI.

The decision of the Court of Appeals is, as we have shown, in conformity with Ohio law and the decisions of the Sixth Circuit applying that law. Even if it were not, however, the disagreement would not constitute a "special and important reason" for granting a writ of certiorari as required by Rule 19(1) of the Rules of this Court. In every case in which State law is applied by a Court of Appeals, the contention can be made that the decision conflicts with decisions of the State Courts or of another Circuit. However, unless some matter more important than the private interests of the litigants is shown, the mere fact of asserted conflict in applying State law is insufficient to warrant certiorari. In *Baxter Admr.* v. *Continental Casualty Co.*, 284 U. S. 578, 579 (1931), this Court observed:

> "As the decision of the Circuit Court of Appeals merely applied the law of the State, no question is present which gives this Court jurisdiction of the appeal."

The Court said in *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 206 (1938) that "as to questions controlled by State law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

Cases decided on one set of facts may appear on the surface to conflict with other cases decided on different facts. For the Court to issue a writ of certiorari in a case such as we have here would commit the Court to a policy of analyzing and applying the laws of the 50 states. That, however, is the function of the Courts of Appeals. In the past this Court has refused to grant certiorari in cases in

which the same arguments were made as are presented here:

Wheat v. *Baltimore and Ohio Ry. Co.*, 262 F. 2d 289, cert. den. 359 U. S. 1005.

T&P Ry. Co. v. *LaBorde*, 257 F. 2d 587, cert. den. 358 U. S. 928.

Illinois Central RR. Co. v. *Underwood*, 235 F. 2d 868, cert. den. 352 U. S. 1001.

To do otherwise would be to take over the function of the Court of Appeals and burden the Court with the kind of docket congestion that would make it difficult, if not impossible, for the Court to give proper attention to the cases which the Court is intended to adjudicate.

Here the Court of Appeals carefully analyzed the record and concluded, as was its duty, that under Ohio law petitioner was guilty of contributory negligence as a matter of law. In this situation this Court should "leave undisturbed, by denying certiorari, decisions of the Court of Appeals involving solely a fair assessment of the record on the issue of unsubstantiality." *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502 (1951).

The present case is an ordinary open country railroad crossing accident of the type handled with competence and careful attention by the Courts of Appeals as part of their everyday business. To the task of examining the record in the light of the applicable law they bring a thorough experience in dealing with evidence and determining its sufficiency to go to the jury.

The Court of Appeals was constrained to follow Ohio law under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). It examined the evidence in the light most favorable to petitioner. The conclusion that, under the Ohio cases, the evidence established petitioner's contributory negligence as a matter of law is not one which there are "special and important reasons" for this Court to review.

CONCLUSION.

The foregoing shows the reasons set forth in the petition for granting the writ of certiorari are without merit. Respondent urges the writ be denied.

Respectfully submitted,

JAMES A. VELDE,
JOSEPH P. CARR,
33 South Clark Street,
Chicago 3, Illinois,
Attorneys for Respondent.

GARDNER, CARTON, DOUGLAS, ROEMER & CHILGREN,
Of Counsel.

APPENDIX.

Page's Ohio Revised Stat. Ann., Sec. 4513.20 provides:

Brake Equipment

The following requirements govern as to brake equipment on vehicles:

* * * * *

(G) "Every trackless trolley, motor vehicle, or combination of motor-drawn vehicles shall be capable at all times and under *all conditions of loading* of being stopped on a dry, smooth, level road free of loose material, upon application of the service or foot brake, within the following specified distances, or shall be capable of being decelerated at a sustained rate corresponding to these distances:

"(1) Trackless trolleys, vehicles, or combinations of vehicles having brakes on all wheels shall come to a stop in thirty feet or less from a speed of twenty miles per hour."

Sec. 4955.33:

Warning Signs

Sec. 4955.33. *Warning Signs at public road grade crossing.*

"At all points where its railroad crosses a public road at a common grade, each company shall erect a sign with large and distinct letters placed on it to give notice of the proximity of the railroad and warn persons to be on the lookout for the locomotive. A company which neglects or refuses to comply with this section is liable in damages for all injuries which occur to persons or property from such neglect or refusal."

Interstate Commerce Act, 49 U. S. C., Sec. 304:

"304. General duties and powers of the Commission.—(a) Powers and duties generally. It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part [§§ 301-305, 306-327 of this title], and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

The Interstate Commerce Commission regulations provide:

49 C. F. R. Part 192. *Driving of Motor Vehicles.*
Section 192.3. *Driving Rules to be obeyed.*

"Every motor vehicle shall be driven in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated, unless such laws, ordinances and regulations are at variance with specific regulations of this Commission which impose a greater affirmative obligation or restraint."

Section 192.11. *Railroad grade crossings; slowing down required.*

"Every motor vehicle other than those listed in Section 192.10 shall, upon approaching a railroad grade crossing, be driven at a rate of speed which will permit said motor vehicle to be stopped before reaching the nearest rail of such crossing and shall not be driven upon or over such crossing until due caution has been taken to ascertain that the course is clear."